BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	IB Dkt. No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93

To: The Commission

COMMENTS OF HOME BOX OFFICE

Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits comments in response to the Notice of Proposed Rulemaking ("NPRM") released May 15, 1995, in the above captioned matter.[1] HBO is a leading supplier of premium video entertainment services that are distributed by satellite to commercial affiliates, such as cable television operators, DBS operators, SMATV operators and other wireless cable operators, and to individual satellite earth station owners. Thus, HBO is an interested party in the above captioned matter.

I. INTRODUCTION

HBO generally supports the Commission's proposed revisions to the rule preempting local regulation of satellite earth

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[1] Notice of Proposed Rulemaking in IB Docket No. 95-59, FCC 95-180 (rel. May 15, 1995).

stations.[2] However, as described below, the proposed rule needs some further minor revisions and clarifications.

II. REVISIONS AND CLARIFICATIONS NEEDED FOR PROPOSED RULE

A. The Reasonableness Test in Section 25.104(a) of the Proposed Rule

1. The Commission Should Preempt Local Zoning Ordinances That Impose Costs That Exceed a De Minimis Amount on Users of Satellite Antennas

Section 25.104(a) of the proposed rule preempts ordinances that "substantially limit reception" or impose "substantial costs" on consumers, unless such ordinances are otherwise found reasonable.[3] The Commission stated that this revision is intended to eliminate any balancing of cost and reception issues;[4] a revision HBO supports.

However, HBO believes that the underlying federal interest in promoting the widespread availability of satellite communications[5] would be far better served if the Commission were to preempt ordinances that impose costs on satellite users that are more than de minimis. A preemption standard based on "substantial" costs provides too much leeway for local authorities to adopt ordinances which impose costs that, while perhaps not "substantial," still have the effect of discouraging satellite antenna ownership.

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[2] 47 C.F.R. § 25.104.

[3] Section 25.104(a) of the Proposed Rule.

[4] NPRM at ¶ 58.

[5] See NPRM at ¶ 42.

Moreover, a "substantial" test is somewhat vague. For example, some local authorities might conclude that costs less than $500 are not substantial. Others might conclude that only costs above $300 are substantial. Yet, for some consumers an additional cost of $100 would be substantial and could result in a decision not to purchase the antenna.

In contrast, if the Commission adopts a de minimis standard, it will be sending a clear message to local authorities that only the most minimal additional costs will be tolerated. Such a message is particularly appropriate in light of the fact that cable operators typically pay a percentage of revenues to local governments while no such fee is paid by satellite antenna owners. Thus, local authorities arguably have an incentive to discourage satellite antenna ownership. Finally, a de minimis cost standard in subsection (a) would not unduly restrict local authorities since they have the opportunity under subsection (a)(1) and (a)(2) to justify ordinances which impose higher costs based upon a showing that such ordinance is reasonable in relation to a clearly defined and expressly stated health, safety, or aesthetic objective and the federal interest in promoting the broad use of satellite antennas.

2. The Commission Should Amend the Reasonableness Test to: 1) Require Local Authorities to Expressly State The Required Justification in Any Zoning Ordinance; and 2) Expand the Scope of the Federal Interest to Include the Promotion of a Diversity of Information Sources.

As stated above, Section 25.104(a) of the proposed rule generally preempts ordinances that "substantially limit reception" or impose "substantial costs" on consumers. However, an ordinance will not be preempted if the promulgating authority can demonstrate that such ordinance is reasonable in relation to: 1) a clearly defined and expressly stated health, safety, or aesthetic objective; and 2) the federal interest in fair and effective competition among competing communications service providers. This Commission should amend this test in two ways.

First, under part one of the test, the Commission should require local authorities to specify "a clearly defined and expressly stated health, safety, or aesthetic objective" as part of the local ordinance. This clarification is necessary to give satellite antenna owners an adequate opportunity to assess the likelihood that they will be able to place their antenna in a location that does not run afoul of a legitimate zoning restriction. If the health, safety, or aesthetic objective is not specified in the ordinance, consumers will have no reasonable ability to determine whether the local authority even has a rationale, let alone whether the rationale is sufficient. In effect, a consumer wishing to purchase a satellite antenna would have to accept the risk that its purchase would subsequently be

[redacted]

risk would create an unnecessary barrier to the purchase of satellite antennas and would be inconsistent with the Commission's goal of increasing the competitiveness of satellite-to-home video distribution. In addition, requiring local authorities to specify a health, safety, or aesthetic rationale in the zoning ordinance will discourage ad hoc policymaking. Local authorities should not be permitted to invent a new rationale each time a consumer attempts to place a satellite antenna. Rather, if a valid justification exists, the local authority should be required to state it up front in the ordinance. Local authorities will not be prejudiced by such a requirement. Either the local authority has a valid justification or it does not. If it does, then stating the justification in the ordinance should not pose any burden. If it does not, then the ordinance is invalid and should not be adopted.

Second, the Commission should clarify that the second part of the test -- "the federal interest in fair and effective competition among competing communications service providers" -- includes the longstanding federal interest in increasing the multiplicity of diverse information sources. The Supreme Court has expressed this interest as follows:

> [T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.[6]

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[6] Associated Press v. United States, 326 U.S. 1, 20 (1945); see also Metro Broadcasting v. FCC, 497 U.S. 547, 567 (continued...)

Indeed, the Commission often has recognized the need to promote multiple information sources:

> [47 U.S.C. § 151 and 47 U.S.C. § 705] establish a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation.[7]

Although this broader federal interest in receiving satellite delivered signals arguably is implicit in the proposed rule,[8] it should be specifically included in the text of Section 25.104(a)(2). Otherwise, the articulation of the federal interest in the proposed rule may be construed in a way that is too narrow and does not adequately reflect the historical value placed on information diversity.

B. In Order to Rebut the Presumption of Unreasonableness in Subsection (b) of the Proposed Rule A Local Authority Must Demonstrate that the Local Interest Outweighs the Federal Interest.

Section 25.104(b) of the proposed rule presumes that regulations covered under subsection (a) are unreasonable if they affect the installation, maintenance, or use of: 1) a satellite receive-only antenna that is two meters or less in diameter in commercial or industrial areas; or 2) a satellite receive-only antenna that is one meter or less in any area.

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[6](...continued)
(1990), overruled on other grounds by Adarand Constructors, Inc. v. Pena, No. 93-1841, 1995 U.S. LEXIS 4037 (June 12, 1995) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is [] an integral component of the FCC's mission.")

[7] Satellite Earth Stations, 59 RR 2d 1073, 1079 (1986).

[8] See NPRM at ¶ 41.

Under subsection (c) of the proposed rule, a promulgating authority can rebut a presumption of unreasonableness by showing that the regulation in question: 1) is necessary to accomplish a clearly defined and expressly stated health or safety objective; 2) is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and 3) is specifically applicable to antennas of the class mentioned in paragraph (b).

Missing from the showings required to rebut a presumption of unreasonableness is that the local regulation is reasonable in relation to the federal interest in promoting competition among competing communications services providers as required by the proposed general reasonableness test of § 25.104(a)(2).[9] It makes no sense to consider the elements of subsection (c) without reference to the federal interest. The critical issue is whether the justifications that a local authority may cite pursuant to subsection (c) outweigh the federal interest. It is not possible to resolve this issue unless the comparison is made between the local justification and the federal interest. Consequently, the Commission should specifically include the federal interest as part of the calculation in subsection (c).

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[9] As explained above, the federal interest should also include the longstanding goal of promoting a diversity of information sources.

C. Exhaustion of Remedies/Commission Review

1. Permits that are Conditioned Upon the Expenditure of More Than De Minimis Costs Should Be Reviewable by the Commission

Sections 25.104(e)(1)-(4) of the proposed rule create four situations in which nonfederal administrative remedies will be considered exhausted and a petition to the Commission will be considered ripe. One of the possibilities for Commission review -- subsection (e)(3) -- is when the petitioner has been informed that a permit or other authorization will be conditioned upon the "petitioner's expenditure of an amount greater than the aggregate purchase and installation costs of the antenna."[10]

For the following reasons, subsection (e)(3) should be amended to permit a petitioner to obtain Commission review if the expenditures required by the ordinance are more than de minimis:

- Local zoning ordinances can impose costs that discourage purchase of satellite antennas even if the costs are not greater than the aggregate purchase and installation costs of the antenna. For example, an average C-band satellite antenna and installation costs approximately $2500. Thus, an ordinance that imposed an additional cost of over $2000 would not trigger Commission review under proposed subsection (e)(3). Even with less expensive DBS satellite antennas, an ordinance could impose costs up to $800[11] without providing consumers the right to Commission review.

  For some, perhaps many consumers, such added expenses will influence the decision to purchase or not purchase a satellite antenna. Moreover, the proposed rule could have the inadvertent effect of encouraging some localities to impose ordinances with costs just below

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[10] Id.

[11] An average DBS antenna and installation costs consumers approximately $850 - $900.

the cost of the satellite antenna. Localities should not be permitted to "game" the rules in such a manner.

- If the Commission does not amend subsection (e)(3), it will be violating its own proposal to "eliminate any 'balancing' as to issues of cost..."[12]

- Providing a de minimis review standard in subsection (e)(3) would have the advantage of conforming the subsection with the de minimis standard HBO proposed above for the general preemption test in subsection (a). Different standards will promote needless confusion and run counter to the Commission's objective in this proceeding to "facilitate application of the Commission's interpretations in varied factual settings."[13]

  Even if the Commission declines to replace the "substantial" test in subsection (a) with a de minimis test, subsection (e)(3) must be amended because as proposed it could effectively deny satellite owners the ability to obtain Commission review. This is because the standard for Commission review in subsection (e)(3) is higher than the general preemption standard in subsection (a). Consider, for example, a local zoning ordinance that imposes a cost that is "substantial," but which is less than the aggregate purchase and installation price of a consumer's antenna. Under the general preemption standard in subsection (a), the ordinance would be preemptible because it imposes costs that are "substantial". However, the ordinance would not be reviewable under subsection (e)(3) because the costs are less than the consumer's purchase and installation costs. Thus, the consumer would face the absurdity of an ordinance that is preemptible but is not reviewable.

2. The Ninety Day Local Review Should Commence at the Time of Petitioner's Initial Application Date

The second possibility of Commission review of a controversy -- subsection (e)(2) -- is when a petitioner's application has been pending with the local authority for ninety days. To avoid any confusion, the Commission should clarify that

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[12] NPRM at ¶ 58.

[13] NPRM at ¶ 2.

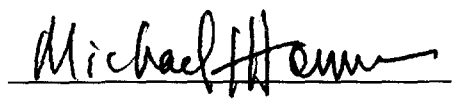
the ninety days commences at the date on which the petitioner initially filed its application.

III. CONCLUSION

HBO respectfully requests that the Commission amend the proposed Section 25.104 consistent with the suggestions contained herein.

Respectfully submitted,

HOME BOX OFFICE



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July 14, 1995